

**BILLING CODE:**

**DEPARTMENT OF JUSTICE**

**Office of the Attorney General**

**28 CFR Part 104**

**CIV 104P; AG Order No.**

**RIN: 1105-AA79**

**September 11<sup>th</sup> Victim Compensation Fund of 2001**

**AGENCY:** Civil Division, Justice.

**ACTION:** Notice of Inquiry and Advance Notice of Rulemaking

**SUMMARY:** Shortly after the September 11, 2001 terrorist attack, the President signed legislation authorizing compensation to any individual (or the personal representative of a deceased individual) who was physically injured or killed as a result of the terrorist-related aircraft crashes on that day. This Notice of Inquiry and Advance Notice of Rulemaking seeks public comment on a range of matters critical to implementing a program that will carry out the intent of the legislation of providing compensation to victims.

**DATES:** Comments in response to this notice are due by November 26, 2001.

**ADDRESSES:** Comments should be submitted by e-mail to: [victimcomp.comments@usdoj.gov](mailto:victimcomp.comments@usdoj.gov), or by telefax to 301-519-5956. Telefaxes should be limited to 15 pages. Comments may also be mailed to Kenneth L. Zwick, Director, Office of Management Programs, Civil Division, U.S. Department of Justice, Main Building, Room 3140, 950 Pennsylvania Avenue NW, Washington, DC 20530. However, in view of the short time period for comments and the current delays in the

delivery of mail, it is strongly recommended that comments be submitted by e-mail or telefax.

Comments received are public records. The name and address of the commenter should be included with all submissions. The text of comments, along with the name and address of the commenter, will be available on the Victim Compensation Fund web site,

[www.usdoj.gov/victimcompensation](http://www.usdoj.gov/victimcompensation). Comments will also be available for public inspection at a reading room in Washington, DC. Arrangements to visit the reading room must be made in advance by calling 888-714-3385 (TDD: 888-560-0844).

**FOR FURTHER INFORMATION CONTACT:** Kenneth L. Zwick, Director, Office of Management Programs, Civil Division, U.S. Department of Justice, Main Building, Room 3140, 950 Pennsylvania Avenue NW, Washington, DC 20530, telephone 888-714-3385 (TDD 888-560-0844).

**SUPPLEMENTARY INFORMATION:**

**Background.**

The President signed the "September 11 Victim Compensation Fund of 2001" (the "Fund") into law on September 22, 2001, as Title IV of Public Law 107-42, 115 Stat. 230 ("Air Transportation Safety and System Stabilization Act") (the "Act"). The purpose of the Fund is to provide compensation to eligible individuals who were physically injured as a result of the terrorist-related aircraft crashes of September 11, 2001, and compensation through a "personal representative" for those who were killed as a result of the crashes. Generally, eligibility extends to those who suffered physical harm or death as a result of the September 11 air crashes, which would include individuals on the planes at the time of the crashes (other than the terrorists) and individuals present at the World Trade Center, the Pentagon, or the site of the crash in

Pennsylvania at the time of the crashes, as well as those present in the immediate aftermath of the crashes.

The Attorney General, acting through a Special Master appointed by the Attorney General, is responsible for the administration of the Fund. By law, regulations addressing certain administrative matters must be issued within 90 days of enactment (i.e. by December 21, 2001). Section 407 of the Act provides that the Attorney General, in consultation with the Special Master, promulgate regulations on four matters by December 21, 2001:

- (1) forms to be used in submitting claims;
- (2) the information to be included in such forms;
- (3) procedures for hearing and the presentation of evidence; and
- (4) procedures to assist an individual in filing and pursuing claims.

In addition, section 407 authorizes the Attorney General to issue additional rules to implement the program.

After determining whether an individual is an eligible claimant under the Act and applicable regulations, the Special Master is to determine the extent of harm to the claimant and determine the amount of compensation to be awarded based on “the harm to the claimant, the facts of the claim, and the individual circumstances of the claimant.” Section 405(b)(1)(B)(i). The law also provides that the Special Master is to make a final determination on any claim within 120 days of its receipt and, if an award is made, to authorize payment within 20 days thereafter. Sections 405(b)(3), 406(a). The determinations of the Special Master are final and are not subject to judicial review. Section 405(b)(3).

The Fund is designed to provide a no-fault alternative to tort litigation for individuals

who were physically injured or killed as a result of the aircraft hijackings and crashes on September 11, 2001. Individuals who may have suffered other kinds of losses as a result of those events (e.g., those without identifiable physical injuries but who lost employment) are not included in this special program. However, the Act provides that a claimant who files for compensation must, at the time of filing, waive any right to file a civil action (or to be a party to an action) in any federal or state court for damages sustained as a result of the terrorist-related aircraft crashes of September 11, 2001.

Claims with the Fund must be filed within two years after the initial regulations are promulgated. Payments from the Fund are made by the United States government, which in turn obtains the right of subrogation to each award.

**General approach to regulations that must be promulgated by December 21, 2001.**

**a) The purpose of this notice.**

As noted above, the Act requires that the Attorney General promulgate regulations in consultation with the Special Master. The Department is currently considering potential candidates for the Special Master position. In addition, the Department is in the process of seeking information from state and local agencies, as well as many other sources, that may be useful in crafting proposed regulations. In the meantime, however, the Department believes that it is very important, to the extent feasible within the time frames involved, to involve the public in the development of any rules established under the program – including, but not limited to, potential beneficiaries of the program, their employers, the legal community, and all those who have come forward to help those impacted. For this reason, the Department has decided to issue this notice to obtain as much public comment as feasible before issuing the rules that it is

required to promulgate by December 21, 2001. This notice describes the issues involved, identifies possible courses of action, and invites comment on a number of points. At various points the Department solicits views on interpretations or applications of the Act. Although the Department welcomes comments, it is ultimately the Department's responsibility to interpret and apply the Act.

**b) The Department's plan to issue implementing regulations by December 21, 2001 as "interim final" rules.**

Although the Attorney General, in consultation with the Special Master, is to issue certain implementing rules by December 21, 2001, the law does not specifically define how such rules must be issued. The Department welcomes comments on these procedural issues.

The Department is considering promulgating the initial rules on December 21, 2001 as "interim final" rules. "Interim final" rules are "final" rules that can be relied upon (and challenged) under the law, but that also become the subject of a new round of immediate comment and review – essentially, asking the public for comment on whether the newly-adopted rules should be amended. The Department wishes to begin processing claims as soon as possible. This procedural methodology should permit the program to commence operations as soon as practicable.

**c) How to comment in response to this notice.**

There are a number of issues presented in this notice, and 21 days are provided for comment. The Department has only a limited time to evaluate the information received in response to this notice. Accordingly, the Department would appreciate comments that are transmitted as soon as possible and in a form that is as succinct as possible. As indicated at the

beginning of this notice, we encourage commenters to use e-mail and telefax for this purpose.

Although the Department will endeavor to review every submission it receives in response to this notice, from handwritten letters to copies of scholarly articles and books, it reserves the right under the circumstances to set aside any information that it lacks the time to consider before the Department must make its determination, even if that information is received before the end of the comment period. The Department urges commenters to submit materials as early within the comment period as possible.

If the Department cannot fully consider all the comments it receives before it must act, the comments will be retained by the Department for subsequent consideration as appropriate. As discussed above, the Department contemplates providing another opportunity for notice and comment after the initial rules are issued in December; any information submitted to the Department in response to this notice that cannot be reviewed before the December rules are issued will be considered during the subsequent review. Similarly, to the extent that any issues addressed in the comments are not addressed in this initial regulatory action, those comments will be retained by the Special Master for appropriate consideration as the program is implemented.

**d) Will there also be meetings and hearings to gather information before December 21, 2001?**

The Department has received many requests for meetings from individuals and groups who wish to provide input on these rules. And it is likely that the Department will wish to initiate such meetings on its own as well. The Department will endeavor to accommodate any such requests as best it can given the available time and any applicable legal requirements.

As a matter of general policy, the Department has declined to take a position prohibiting so-called “ex parte communications” in informal rulemaking proceedings. 28 CFR 50.17. Such a prohibition would inhibit the ability of the Department to obtain valuable information, and would be inconsistent with the nature of informal rulemaking under 5 U.S.C. 553 (as contrasted with so-called “formal” rulemaking under 5 U.S.C. 554, which is handled in a quasi-judicial manner). Consistent with the policy set forth in 28 CFR 50.17, the Department will endeavor to make notes on any relevant meetings or other communications part of the public record.

**e) The effective date of the rules to be promulgated on December 21, 2001.**

The law generally provides that rules not go into effect for at least 30 days after promulgation absent “good cause” to waive this requirement. 5 U.S.C. 533(d). The Department is seeking comment on an appropriate effective date for these rules, including whether “good cause” exists under 5 U.S.C. 533(d) to waive the 30-day requirement. In ideal circumstances, the Department would prefer not to waive the APA’s requirements for at least a 30-day delay in the effective date for rules. Given the circumstances here, however, it seems likely that there may be good cause for taking such action. The Department welcomes comments on this issue and on other alternatives. For example, a 30-day effective date delay might not significantly hinder implementation of the program and would provide time for some initial counseling and other information dissemination prior to the filing of any claims.

**f) Issues relating to the rules to be promulgated by December 21, 2001.**

The Department welcomes comment on whether the rules that must be issued by December 21, 2001, should, pursuant to section 407(5), cover matters in addition to those specifically identified in section 407(1)-(4) of the Act. One reason for making the set of

regulations to be published in December as comprehensive as possible is the possibility that there are some potential claimants who have already filed or will soon be filing civil actions seeking damages arising out of the September 11 incidents. Section 405(c)(3)(B)(ii) of the Act provides that, if an individual is already a party to a civil action when the regulations enumerated in section 407 are promulgated, the individual cannot submit a compensation claim under this federal program unless he or she withdraws from the legal action within 90 days from the date the rules are promulgated. Without having information about how the compensation program works, such individuals might not be able to assess whether the compensation program is a viable alternative to continuing their litigation.

The Department believes that the number of individuals who already have filed a civil claim, or who have irrevocably committed to doing so in the next few months, may well be very small. The Department would welcome information on this point. The Department also would welcome comment as to whether the statutory requirement that a claimant “withdraw[]” from such action by 90 days after the date the initial rules are promulgated was intended to preclude such a claimant from refileing or rejoining a civil action: a) should the claimant ultimately elect not to file a compensation claim under the federal program; or b) if the claimant is determined by the Special Master not to be eligible to file a claim.

In short, potential claimants have an interest in knowing as soon as possible how the program is likely to operate in their circumstances. Litigation to obtain damages, particularly in a mass tort context, can be a lengthy, uncertain, and complex process, filled with substantial risk and expense. The purpose of this compensation program is to offer all potential claimants a more expeditious, predictable, and less complex alternative to that process. The Department



recognizes that unless and until it can provide some certainty as to how the compensation award program will work, some claimants may be reluctant to commit themselves to the Fund as an alternative to tort awards.

We now turn to a set of specific topics on which comment is solicited. The first four topics concern the Department's obligations under section 407(1)-(4) of the Act. The remainder discuss key issues that may also be the subject of regulatory action.

**Topics #1 & 2: The forms to be used in submitting claims under this program and the information to be included on the claims form.**

Section 405(a) of the statute establishes some specific requirements with respect to the claims form and the information to be included. The law requires the Special Master to develop a claims form to use in filing claims for compensation under this program. The Special Master is to ensure that the form can be filed electronically if practicable.

The form must include a statement of the factual bases for eligibility and for the amount of compensation sought. In addition, the form is to request information from the claimant as to: 1) the physical harm suffered by a victim, or information confirming the death of the victim, of the terrorist-related aircraft crashes of September 11, 2001; 2) any possible economic and noneconomic losses that the claimant suffered as a result of the crashes; and 3) any collateral sources of compensation the claimant has received or is entitled to receive as a result of such crashes.

It would appear that these requirements, combined with the statutory time frame for the Special Master to reach a decision once a claim is filed, contemplate a detailed form and filing, including submission by the claimant of supporting documents and relevant medical records.

Accordingly, the Department invites comment on whether the Special Master should determine that a claim has not been “filed” in those circumstances in which the Special Master determines that there is insufficient information submitted to permit a reasonably informed determination to be made. Along similar lines, the Department invites comments on whether there are actions the Special Master should be required to take before he or she can accept a claim, or deem a claim “filed.”

The Department welcomes comment on the design and content of the claims forms in light of the statutory requirements. Specific comments on making the form and its instructions readable and readily available are welcome.

**\_\_\_\_\_ Topic #3:     Procedures for hearing and the presentation of evidence.**

Section 405(b)(4) provides that a claimant has the right, after the filing of the claim, to present evidence to the office of the Special Master. The statute specifically provides that the claimant has the right to present witness statements and documents, the right to be represented by an attorney, and such other due process rights as are determined to be appropriate by the Special Master.

The Department solicits comments on the procedures to be used in taking and evaluating such evidence. In formulating comments, commenters should keep in mind that the Act gives the Special Master a very limited time to evaluate such evidence before making a decision: Section 405(b)(3) of the statute provides that the Special Master must make final decisions on claims within 120 days of the date of filing. Comments as to whether the statute permits the Special Master to temporarily halt or toll the running of this clock, at the initiative of the claimant or otherwise, are welcomed. In addition, the Department invites comment on whether

the Special Master should be permitted to dismiss a claim as not properly filed for lack of adequate supporting information and, if so, whether an individual should thereafter be permitted to refile the claim.

Among other matters, the Department welcomes comment on whether every claimant should be granted an oral hearing or whether paper hearings may be sufficient, and comments on what types of oral hearing may be practicable, consistent with the statutory deadlines. If oral hearings are provided, should the Special Master always use “hearing officers” to hear witnesses and review written evidence? What qualifications and training should those who perform such tasks have? In addition, the Department welcomes comment on whether there are other specific duties and powers that should be delegated to hearing officers (e.g., to ask questions of the claimant or witnesses, to request submissions of such further information as the hearing officer may deem valuable in reaching a decision, and/or to prepare recommended decisions for the consideration of the Special Master).

The Department welcomes comment on whether claimants should have the opportunity to appeal directly to the Special Master specific “rulings” or “working decisions” of a hearing officer on questions that arise in the course of his or her evaluation of the claim. The Department also seeks comment on whether it is authorized to enforce requests made by the hearing officer to third parties for evidence that is necessary to a proceeding – e.g., evidence that might bear on whether all aspects of the claim file on which the decision will be based are accurate and complete. The Department also welcomes comment on whether such proceedings should be recorded, whether such proceedings must be held in a location convenient to the claimant and how to deal with scheduling conflicts, and whether the opportunity for a hearing can be waived

by a claimant through inaction or unwarranted delay.

The Department particularly welcomes comments that reference the practices or experience of existing compensation programs with respect to the hearing of evidence.

**Topic #4: Procedures to assist an individual in filing and pursuing claims under this title.**

The statute does not provide guidance on what actions the Special Master is to take to assist claimants in filing and pursuing claims. However, the Department believes that it is important that claimants be able to proceed without economic experts. Accordingly, the Department welcomes any and all suggestions as to how it can assist claimants, including suggestions for office locations, toll-free phone lines, outreach meetings, and newsletters.

In addition, the Department welcomes comments on whether the Special Master has the authority to limit the types and amounts of fees that can be charged by legal counsel, accountants, experts or others who are retained by claimants to assist them in filing and pursuing compensation claims, and whether such fees can and should be paid by the Special Master directly out of compensation awards. The Department welcomes information about practices in this regard with respect to other federal compensation programs, and welcomes specific suggestions on any appropriate fee schedule or policy. The Department also welcomes comments on what limitations, if any, the rules should impose on non-attorney, non-claimant representatives' participation in filing claims and in subsequent proceedings.

The Department is also interested in comments as to whether it needs to take any actions to ensure that individuals who have the option of filing a compensation claim with this program

are not improperly solicited or influenced by those with an interest in having them make such an election.

Topic #5: **Claimant Eligibility.**

Section 405(b) of the statute requires the Special Master to determine whether a claimant is an “eligible individual” under section 405(c). “Eligibility,” in turn, is defined to include: (i) victims (other than the terrorists) aboard American Airlines flights 11 and 77 and United Airlines flights 93 and 175; or (ii) victims who were “present at” the World Trade Center, the Pentagon, or the site of the aircraft crash at Shanksville, Pennsylvania at the time or in the immediate aftermath of the crashes, and who suffered physical harm or death as a result of such an air crash. The Department seeks comment on whether a Departmental regulation or a statement of policy by the Special Master would be appropriate to clarify these criteria and, if so, what those criteria should be.

Public commentators have suggested differing interpretations of the statutory terms “present at,” “physical harm,” and “immediate aftermath.” The Department invites comment on the appropriate scope of each of those terms. In particular, how should “present at” be interpreted? Should the term “physical harm” be limited to serious injuries, as it is under some other no-fault compensation schemes (*see, e.g.*, N.Y. INSURANCE LAW § 5102 (d) (McKinney 2000)), or should it be construed more broadly? Further, should “physical harm” be limited to currently identifiable injuries? Can and should the program address latent, but not yet evident, harm? What documentation or other evidence should be required by the Special Master as to the claimant’s presence at the World Trade Center or physical harm resulting from the air crash? Moreover, what documentation or other evidence should the Special Master seek to verify the

identity of those lost for whom claims are filed? Finally, what duration of time is intended by the statutory phrase “immediate aftermath”?

Section 405(c)(2)(C) provides that the “personal representative” of an eligible decedent is the appropriate person to file a claim on a decedent’s behalf. The Department seeks comment on whether a Departmental regulation or a statement of policy by the Special Master would be appropriate to clarify questions concerning personal representatives, for example:

- Whether the Special Master should require that all those who consider themselves to be survivors of someone lost in the crashes be notified of a claim by a “personal representative”;
- Whether the Special Master should require that the “personal representative” identify all those who consider themselves to be survivors of someone lost in the crashes and obtain from each a signed statement waiving the right to litigation prior to the acceptance of a claim;
- Whether the Special Master can, within the brief statutory period identified by the statute, determine who among different claimants is the appropriate “personal representative”;
- Whether the Special Master should, in any matter involving a dispute as to the identity of the “personal representative,” require prior adjudication and judgment by a state court of competent jurisdiction; and
- Whether the Special Master should make determinations of compensation for claimants and escrow payment until disputes regarding the identity of the “personal representative” can be resolved by a court of competent jurisdiction.

\_\_\_\_\_ **Topic #6:     Nature and Amount of Compensation.**

Section 405(b) of the statute indicates that the Special Master shall determine the amount of compensation based on “the harm to the claimant, the facts of the claim, and the individual circumstances of the claimant.” Yet each of the perhaps thousands of determinations must be made in a very short period of time. Moreover, such determinations should be founded on consistent and clear principles that treat each claimant fairly. The Department invites comments that identify the practical means to achieve these results all within the very short time period that Congress has permitted. Among other topics, the Department would welcome comment on whether and how schedules or statistical methodologies should be developed and used in reaching a determination for each claimant within the mandated time period. In addition, comments are welcomed on whether publication of such schedules or hypothetical or presumptive awards for classes of individuals would assist potential claimants in determining whether to file.

Economic Loss: As indicated above, the Department is of the view that the Special Master should not require that any claimant employ any experts on economic or other theories of losses. It may therefore be appropriate for regulations to draw on available information from appropriate specialists in relevant fields to analyze economic losses. The Department invites comment regarding the necessary qualifications for such specialists, the data that should be utilized, the methodologies that should be employed in analyzing economic losses, the documentation that should be required for every claimant, and how state law should bear upon such determinations. In addition, the Department invites comments on how to address the

economic losses of individuals whose lost future income streams would have been highly contingent, variable, or unpredictable.

Noneconomic Losses: Section 402(7) lists several types of noneconomic losses that should be considered. The Department invites comments regarding whether, and in what manner, the Special Master can or should draw meaningful distinctions between individuals who died in different locations and, similarly, whether the Special Master can or should draw meaningful distinctions between individuals who suffered similar injuries. The Department also invites comments on whether the Department should issue regulations determining the amount of noneconomic loss for classes of similarly situated individuals or whether, instead, the Special Master should determine all noneconomic loss on a detailed claim-by-claim basis. Further, what facts and circumstances should be considered in determining noneconomic losses for each individual, and what standards should be employed?

Collateral Sources: Section 405(b)(6) provides that the Special Master shall reduce the amount of compensation by the amount of the collateral source compensation the claimant has received or is entitled to receive as a result of the terrorist-related aircraft crashes of September 11, 2001. The Department invites comments on how to determine what constitutes a "collateral source" for purposes of this provision, and other related issues. For example, the Department appreciates the strong policy reasons for excluding charitable contributions from the definition of "collateral sources" and invites comment regarding whether the Act indeed permits the Department to exclude such contributions from the definition. Similarly, the Department invites comments on whether "in kind" and/or material contributions could or should be considered collateral sources. Finally, the Department invites comments on how to determine whether



potential future collateral source payments are ones that individuals are “entitled to receive” for purposes of Section 405(b)(6).

### **Fraud Prevention Measures**

The Department is committed to preventing and prosecuting any fraudulent attempts to collect from the Fund. The Department therefore invites comments regarding any measures that the Department should take to prevent and detect fraud.

### **Other topics for comment**

The Department reiterates that it welcomes public comments on any and all aspects of the administration of the fund.

### **Application of various laws and Executive Orders to this rulemaking.**

There are a number of laws and Executive Orders whose provisions may have implications for this rulemaking process. Due to the preliminary nature of this notice, it does not address these requirements. Nonetheless, the Department welcomes comments that will help it address the applicability of any laws or Executive Orders to future rulemaking under the Act.

Dated:

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John Ashcroft  
Attorney General

